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AUTO EMASJAYA SDN BHD & ANOR v. NG KONG NGAI

HIGH COURT MALAYA, SHAH ALAM
AZIMAH OMAR JC
[ORIGINATING SUMMONS NO: 24-1304-11-2014]
23 APRIL 2016

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CIVIL PROCEDURE: *Judgments and orders – Enforcement – Judgment creditors obtained judgment against company – Company's assets aggressively and drastically dissipated and disposed of after judgment debts were proven and before enforcement of judgment – Majority shareholder and director relinquished shareholding and passed shareholding to other persons – Whether there was civil fraud – Burden of proof of civil fraud – Whether transcends beyond balance of probabilities – Whether there was requirement to file winding up petition before s. 304(1) of Companies Act 1965 may be invoked – Whether director carried on or conducted business to defraud judgment creditors*

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The plaintiffs were judgment creditors ('JC') who had obtained judgment against the defendant's company ('the company'). The defendant was the majority shareholder and director of the company as well as another company, JC Racing Sdn Bhd ('JC Racing') which operated the same registered business premises of the company. The plaintiffs set off on their own pursuits of enforcing the judgment by filing a writ of seizure and sale and a notice under s. 218 ('s. 218 notice') of the Companies Act 1965 ('the Act'). However, the bailiff halted the seizure of the company's assets at the company's premises on the pretext or understanding that the premise, as well as its contents or assets, were no longer owned by the company and instead were in the holding of JC Racing. Numerous searches and the company's own audited accounts revealed that (i) all the company's assets were aggressively and drastically dissipated and disposed of after the judgment debts were proven and around before the plaintiff's pursuits in enforcement of judgment; (ii) none of the proceeds from the sale of the assets were accounted for into the company's holding; (iii) the defendant relinquished his shareholding and passed his shareholding to other persons eight days after the s. 218 notice was served against the company. In relying on *John & Partners Construction Sdn Bhd v. Y & G Corporation Sdn Bhd* ('*John & Partners*'), the defendant submitted that the burden of proof to prove civil fraud transcends beyond balance of probabilities. The issues that arose for the court's determination were (i) whether there is a requirement to file winding up petition before s. 304(1) of the Act may be invoked; and (ii) whether the defendant carried on or conducted the business to defraud the JC.

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Held (ordering accordingly):

(1) Nowhere in the decision of *John & Partners* was it ever decided that the burden of proof to prove civil fraud under s. 304(1) of the Act transcends beyond the balance of probabilities. The burden of proof required to prove civil fraud under s. 304(1) of the Act is verily on the balance of probabilities. (paras 13 & 14)

(2) A simple reading of s. 304(1) of the Act would entail the obvious disjunctive reading of '… in the course of the winding up of a company or in any proceedings against a company …'. The provision shall be viable to be contended without any winding up action. As the JC of the company, the plaintiffs fell squarely within the application of s. 304(1) of the Act as the provision provides that a declaration may be granted by the court on the application of a JC. Therefore, the plaintiffs indeed had the proper *locus* as the JC to invoke s. 304(1) of the Act against the defendant even without initiating any winding up actions against the company (paras 17, 19, 20 & 21)

(3) The very essence of fraud against a creditor is the deprivation of payments to the creditor. Legally and commercially speaking, a creditor's main rights against a debtor would be the right to be paid. If there is one fraud that would detriment a creditor, it would be a fraud in which is purposed to defraud a creditor and deprive that creditor from his rightful payment. (para 22)

(4) The fact that the defendant had, all too conveniently, removed himself from directorship and shareholding just over a week after the company's receipt of the s. 218 notice only added to the fraudulent effect of the defendant's conduct. Although the defendant attempted to justify this act to be a common practice in commerce, it was far too compelling and overwhelming an inference that the act was intended to further cloak the fraud when the act was coupled with facts of the unexplained aggressive and drastic dissipation and disposal of the company's assets during the defendant's tenure as the company's director. (para 34)

(5) The defendant had conducted the business of the company with the intent to defraud the plaintiffs or for a fraudulent purpose. Having full knowledge of the fraudulent conduct, the defendant shall be attached with the company's liability to pay the plaintiffs their respective judgment sums and costs. (paras 41 & 42)

Case(s) referred to:

Dato' Gan Ah Tee & Anor v. Kuan Leo Choon & Ors [2012] 1 LNS 734 HC ***(refd)***

John & Partners Construction Sdn Bhd v. Y&G Corporation Bhd [2014] 1 LNS 401 HC ***(refd)***

Kawin Industrial Sdn Bhd (In Liquidation) v. Tay Tiong Soong [2009] 1 MLJ 723 ***(refd)***

LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors [2010] 4 CLJ 849 HC ***(refd)***

Premium Vegetable Oils Bhd v. ICG Systems Sdn Bhd & Ors [2006] 7 CLJ 364 HC ***(refd)***

A *Re Scarfax Ltd [1979] 2 WLR 202* ***(refd)***
Re William C Leitch Bros Ltd [1932] 2 Ch 71 ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Siow Yoon Keong v. H Rosen Engineering BV [2003] 4 CLJ 68 CA ***(refd)***

Legislation referred to:

B Companies Act 1965, ss. 218, 304(1)

For the 1st plaintiff - Yusrin Faidz; M/s Faidz, Leong & Chong
For the 2nd plaintiff - Mohd Khairil; M/s Ling & Mok
For the defendant - Godfrey D'Cruz; M/s Godfrey D'Cruz & Co

Reported by Najib Tamby

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JUDGMENT

Azimah Omar JC:

Preliminary

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[1] This court had on 22 June 2015 allowed the plaintiffs' amended originating summons in encl. 16 with costs. The subject matter of this case relates to a judgment obtained by the plaintiffs against the defendant's company, JC Asia Motorsports (M) Sdn Bhd *vide* the Shah Alam Sessions Court Summons S1-2261-2008 for the sum of RM138,162.34 (RM32,476 &
E RM105,686.34 with interests of 8% per annum). Since the judgment sum is less than RM250,000, in order to appeal against this court's decision, leave must first be obtained from the Court of Appeal. On 11 March 2016, the defendant was granted leave by the Court of Appeal to appeal against the decision of this court dated 22 June 2015.

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Background Facts

[2] The present case before this court is basically a straightforward malevolent plot devised by a fraudster, insidiously manipulating legal principles, to allow the fraudster's company to eschew away from an
G inevitable liability to pay its creditors.

[3] It is simply a case of the alter ego of a company, a director, who has dramatically dissipated and disposed of the company's assets, to deprive the company's judgment creditors from their rightful payments and compensations. And for added fraudulent effect, this director has all too
H conveniently transferred his majority shareholding to other persons, to add another layer of fraudulent protection underneath a cloak of a separate corporate identity.

[4] The present case latches on by and large to the operation of s. 304(1) of the Companies Act 1965 ("Act") which reads:

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> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of

> any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[5] As a short precursor to the in-depth deliberation on this provision, this court must highlight that the parties have engaged in the reading and application of the provision in a manner that has unfortunately deviated from the real essence and requisites of the section. And these red herrings and distractions are of course brought forth by counsel of the fraudster defendant. It must be clear as this early juncture that, firstly, the identity of the person who fraudulently received or retained the judgment debtor-company's assets, or to whom was the assets were transferred to is irrelevant. It is not the requirement of this provision that the assets must be disposed to the benefit of the fraudster. What is pertinent to be proved is only the factum of dissipation and disposal of assets which deprives creditors off of their rightful payments. Thus, the whole contention by the defendant on the requirement of proof of disposal of assets to the holding of the defendant or his other companies are utterly irrelevant and bears no effect at all in the present case. Secondly, the meaning of carrying on the business or carried on the business of the company is by no means strictly referring to the ordinary course of business or trade that the company usually engages in. It is not necessary to prove that the judgment-debtor company is still conducting business whether by its own corporate identity or another. Any dealing by the company or by the company's alter ego which is purposed to defraud the company's creditors, which includes dissipation of assets, is definitely within the meaning and ambit of the provision. Even if the conduct of disposing assets is not the company's ordinary business, such conduct which deprives creditors of their rightful payments is still within the operability of the provision.

[6] Auto Emasjaya Sdn Bhd, a private limited company incorporated in Malaysia and Low Chee Sang ("plaintiffs") are judgment creditors who have obtained a judgment for judgment sums of RM32,476 with interests of 8% per annum, and RM105,686.34 with interests of 8% per annum, against the defendant's company, JC Asia Motorsports (M) Sdn Bhd ("the company"), of which the defendant is the company's majority director-shareholder.

[7] Ng Kong Ngai ("defendant") is the majority shareholder and director of the company as well as another company JC Racing Sdn Bhd ("JC Racing") a company which all too convenient for the defendant, operates at the same registered business premises of the company. Having said that, it is easy to ascertain that the defendant is the alter egos of both the company as well as JC Racing.

The Defendant Is Liable For Defrauding The Plaintiffs Off Of Their Rightful Payments Of The Judgment Sums From The Company

[8] Entailing the above earlier judgment, the plaintiffs of course set off on their own pursuits of enforcing the judgment. Thus, Auto Emas Jaya Sdn Bhd ("P1") filed a writ of seizure and sale on 3 June 2014 and sought to enforce the writ on 25 August 2014 at the company's place of business. Low Chee Sang ("P2") proceeded to issue a notice under s. 218 of the Act on 13 February 2012.

[9] Clearly establishing the factum of deprivation of payment against these creditor-plaintiffs, is the fact that the company has never furnished any form of payment against P2's s. 218 notice and that the enforcement of P1's writ of seizure and sale by the court's bailiff has failed. The bailiff has aptly noted in his report:

> Perlaksanaan tidak berjaya kerana nama syarikat tidak sama dengan writ. Nama syarikat sekarang ada JC Racing dan bukannya JC Asia Motorsports. Deposit perlaksanaan dipulangkan kepada wakil peguam untuk tindakan selanjutnya.

[10] A plain reading of this report would easily reveal the inference that the bailiff has halted the seizure of the company's assets at the company's premises on the pretext or understanding that the premise (which is the registered business premise of the company) as well as its contents or assets are no longer owned by the company, and instead are in the holding of another company, JC Racing which is also the proprietorship of the defendant. If this was not the case, then there would be no reason whatsoever that would lead the bailiff to cease the enforcement at the company's business premises. In essence, the state of the company at this material time was that it no longer owns any assets or monies to pay its judgment creditors which *inter alia* include the two plaintiffs in the present case.

[11] Further solidifying the factum of the defendant's fraudulent deprivation against the company's creditors are the following facts which were revealed *vide* numerous searches as well as the company's own audited accounts during all material times:

(i) all too conveniently for the company and the defendant, all of the company's assets were aggressively and drastically dissipated and disposed of between the period of 30 September 2011 to 30 September 2012 (which is after the judgment debts were proven and around before the plaintiffs' pursuits in enforcement of judgment)

(ii) absolutely none of the proceeds from the sale of the assets were accounted for into the company's holding. The proceeds simply never reached the company as the vendor of the assets.

(iii) all too conveniently for the defendant to hide further underneath the cloak of corporate identity, the defendant relinquished his shareholding and passed his shareholding to other persons on 21 February 2012 which is just eight days after the s. 218 notice was served against the company.

[12] Now, having all the above facts in mind, this court shall proceed to briefly allude to the laws relevant to the present case.

The Burden Of Proof Is On The Balance Of Probabilities

[13] This court must express its discontent against counsel for the defendant who has in his fit of desperation of salvaging an obviously fallible defence, for drawing incorrect and misleading interpretation of the law particularly on the burden of proof applicable to this present case. Referring to the defendant's submissions, the defendant has generously quoted the decision in the case of *John & Partners Construction Sdn Bhd v. Y&G Corporation Bhd* [2014] 1 LNS 401, the defendant has audaciously submitted that the burden of proof to prove civil fraud to be "lebih daripada tahap imbangan kebarangkalian". It is audacious simply for the reason that nowhere in the decision in *John & Partners* that it was ever decided that the burden of proof to prove civil fraud under s. 304(1) of the Act transcends beyond the balance of probabilities. This court must warn against such loose and lackadaisical drawing of inference from a decision, particularly on essential principles of the law such as the burden of proof of a case.

[14] As precisely contended by learned counsel for P1, the Court of Appeal since the year 2003 has already decided and reaffirmed again in the year 2012 in the High Court in the case of *Dato' Gan Ah Tee & Anor v. Kuan Leo Choon & Ors* [2012] 1 LNS 734; [2012] 10 MLJ 706 that the burden of proof required to prove civil fraud under s. 304(1) of the Act is verily, on the balance of probabilities:

> In normal circumstances where fraud is alleged in civil proceedings, it has to be proved beyond reasonable doubt; however, by the term 'if it appears' as used in s. 304(1) of the Act, it indicates that a lower degree of proof is required. The standard of proof in cases under s. 304(1) of the Act is one of a balance of probabilities.

[15] Not only that, this issue has already been settled once and for all by the recent Federal Court decision in the case of *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1 (FC) that the burden of proof for a case of civil fraud is no longer beyond reasonable doubt, but is now based on the balance of probabilities.

There Is No Requirement To File Winding Up Petition Before Section 304(1) Of The Act May Be Invoked

[16] Preposterously, counsel for the defendant, for lack of any better defence, contended that a winding up action must first be commenced to allow the liquidators to contend on s. 304(1) of the Act.

[17] This contention is outright incredulous and misleading. A simple reading of the provision would entail the obvious disjunctive reading of "... in the course of the winding up of a company or in any proceedings against a company ..." The provision shall be viable to be contended without any winding up action.

[18] The defendant attempted to substantiate this contention referring to this excerpt of the decision in *John & Partners* case:

> What then must be proven in order to attach to a person liability *in persona* for the debts of the INSOLVENT COMPANY? First, it must be established that there is an 'intent to defraud' in the manner by which the business of the company is being conducted. Second, it must also be proven that the said intent arose once the company had become insolvent.

[19] Referring to the above excerpt, it is patently clear that the question posed and dealt with by the court in this case is regarding the liabilities of an insolvent company which is vastly different with the present case which is dealing with the judgment debts of a solvent company. The second limb of the requisite in the excerpt above is not applicable in the present case.

[20] And the plaintiffs being the judgment creditors of the company, fall squarely within the application of s. 304(1) of the Act, as the provision provides that a declaration may be granted by the court on the application of a creditor. Even the case of *John & Partners* supports this finding:

> Only when the 'intent' element is established can a liquidator OR CREDITOR proceed to pursue a person or persons for the purpose of attaching liability.

(see also *Premium Vegetable Oils Bhd v. ICG Systems Sdn Bhd & Ors* [2006] 7 CLJ 364; [2006] 7 MLJ 39, HC)

[21] Thus, it is this court's finding that the plaintiffs indeed have the proper *locus* as judgment creditors to invoke s. 304(1) of the Act against the defendant even without initiating any winding up actions against the company.

The Defendant Has Carried On Or Conducted The Business To Defraud The Judgment Creditors

[22] The factum of fraud against creditors under s. 304(1) of the Act is left open for a wide interpretation. There is nothing in the section to indicate the Parliament's intention to define fraud against creditors in a strict and narrow manner. But the very essence of fraud against a creditor is of course the deprivation of payments to the creditor. Legally and commercially speaking, a creditor's main rights against a debtor would be the right to be paid. Thus, if there is one fraud that would detriment a creditor, it would be a fraud in which is purposed to defraud a creditor and deprive that creditor from his rightful payment.

[23] Now as highlighted very early in this judgment, the terms "any business of the company has been carried on with intent to defraud creditors" and "carrying on of the business" in the provision is by and large not referring to the conduct of carrying on a company's business in the ordinary course of business or the nature of the company's trade. It is utterly unnecessary for the plaintiffs to prove that the defendant's company was indeed still in operation or still conducting its usual business. What these terms really refer to is simply, the act of a person, usually the alter ego of a company, in dealing with the business, inclusive but not limited to the company's assets, liabilities, and finances which fraudulently deprives creditors of their rights. It is not at all referring to proof that the company is still operating. Suffice that it is proven that a person has dealt with the company in a manner in which deprives creditors of their rights to be paid.

[24] This court is guided by the case of *Re Scarfax Ltd* [1979] 2 WLR 202:

> ... that the expression "carrying on any business was not necessarily synonymous with actively carrying in trade, and accordingly the collection of assets acquired in the course of business and the distribution of proceeds thereof in payment of debts could constitute the carrying on of "any business" ...

[25] In other words, any dealings which in effect dissipate a company's capability to pay its creditors fall within the ambit of s. 304(1) of the Act. It is ultimately unnecessary to prove that a company is actively carrying out its ordinary trade.

[26] Further reference should be given to the case of *LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors* [2010] 4 CLJ 849; [2010] 1 MLJ 185 whereby the High Court has held that:

> The words 'any business of the company has been carried out ...' in s. 304(1) of the Act had been interpreted to include a myriad of activities and transactions undertaken by a company.

[27] With regard to the element of intent to defraud a creditor, upon reading the mass of precedents submitted by parties, it is apparent that the intent to defraud under s. 304(1) of the Act is generally proven by evidence of a conduct dealing with the company, which leads to a preferential payment or undue/unfair advantage to other individuals, other than the company's creditors, which fraudulently deprives the company's creditors their rights to payment. So long as the conduct has an effect of allowing a company to elude or eschew away from its liability to pay its creditors, such conduct can be deemed to be carried out with fraudulent intent to defraud creditors.

[28] This court is guided by the case of *Kawin Industrial Sdn Bhd (In Liquidation) v. Tay Tiong Soong* [2009] 1 MLJ 723 HC in which the High Court has held:

> On the facts the purchase of the machinery from Kawin and the subsequent sale of the machinery to Skytex for RM115,500 which was

paid personally to the defendant, was clearly carrying on the business of the plaintiff and therefore within the context of s. 304(1) of the Act.

[29] Now, at this juncture, this court reiterates the prelude earlier that the fact that the fraud does not benefit the defendant is utterly irrelevant in the operation of the provision. Although the case of *Kawin* above deals with a defendant which defrauds the creditors, with monies which was paid personally to the defendant, the factum of the defendant personally benefiting from the fraud remains to be irrelevant and not a requisite to the provision. What is pertinent in *Kawin* case is that the defendant has conducted the company's dealing in a manner in which proceeds from the company's sale of the machine (which was supposed to be paid to the creditor) was not paid to the creditor, and this deprives and defrauds the creditor of its rights to be paid.

[30] This sentiment of preferential payment resulting to deprivation against creditors is echoed in the decision of the Court of Appeal in *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68; [2003] 4 MLJ 569, CA in which the Court of Appeal has referred to the English case of *Re William C Leitch Bros Ltd* [1932] 2 Ch 71:

> The test of facts before this court show the conduct of the defendant as Managing Director of the Company deriving himself an unfair advantage over that of a creditor ... His conduct in preferring himself in payment over the priority trade debts ... constituted an intention to defraud; or at least a fraudulent preference - morally not acceptable by the commercial world ...

[31] The Court of Appeal then continues to state that:

> In the present case, the RM423,000.00, when received by Ventura from Petronas should be paid to Rosen. Ventura did not pay Rosen. Instead, the appellant, the alter-ego of Ventura used it or part of it to invest in share market ...
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> ...
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> By any standard, civil or criminal, clearly there was an intention to defraud Rosen or that it was done with fraudulent purpose.

[32] Herein, with all the above legal principles properly minded, it is patently clear that the defendant, as alter ego of the company has conducted the company's business in a manner to defraud the creditors. Particularly referring to the mysterious, urgent, and aggressive disposal of the entirety of the company's assets during the defendant's directorship, which records proceeds of RM355,629.11; the same proceeds which were unaccounted for by the company and the same sale in which the defendant himself was unable to explain the details of the sale as well as the same siphoning of funds which results in the company's abject cash flow of a measly RM4,335,62 despite the multi-hundred thousands ringgit sale of assets.

[33] Similar to *Rosen* case above, these are the exact proceeds which should have been paid to the creditor-plaintiffs but instead was siphoned out by the defendant, simply purposed to fraudulently deprive the creditor-plaintiffs from their rights for payments from the company.

[34] The fact that the defendant has all too conveniently removed himself from directorship and shareholding just over a week after the company's receipt of the s. 218 notice only adds to the fraudulent effect of the defendant's conduct. The defendant attempted to justify this act to be a common practice in commerce. However, it is far too compelling and overwhelming an inference that this act is intended to further cloak the fraud when this act is coupled with the fact of the unexplained aggressive and drastic dissipation and disposal of the company's assets during the defendant's tenure as the company's director.

[35] This court does note that the defendant contends that what is purported by the plaintiffs is contrary to the doctrine of corporate personality, and seeks to lift the veil of incorporation. Verily, it is against the doctrine of separate corporate personality. However, it is also trite law that this doctrine has its own set of caveats and exceptions. It is also trite law that to any extent or measure, this court shall never be a conduit or instrument of fraud. Section 304(1) of the Act is the exact exception to the doctrine of corporate personality. All of the cases on s. 304(1) of the Act above have discussed the liability of the alter ego of companies to his fraudulent conduct. And the defendant being a director and holding 70% majority shareholding of the company is clearly the alter ego of the company. The corporate identity is a fictitious identity with obvious limitations. It cannot form its own intent, what more a fraudulent intent. Thus, when a person conducts dealings in the name of the company to defraud the company's creditors, that will and intent is personal to that person and not to the company. Thereto, it is only just and appropriate for this court to lift the veil of incorporation and identify the real fraudster hiding within the shadows of his own shameful cowardice.

[36] Thus, the doctrine of corporate personality is no bar to the plaintiffs' action against the defendant in the present case.

[37] In a last stitch effort to resuscitate the defendant's dying case, the defendant contends that the earlier decision in the Sessions Court has included the defendant as the second defendant in which the Sessions Court has dismissed the action against the second defendant and holds the first defendant, the company liable for the loss of the cars owned by the plaintiffs. It is very easy for this court to see the flaw in this contention. The earlier case in the Sessions Court dealt with the company's personal liability to pay losses incurred against the plaintiffs from the loss of the plaintiffs' vehicles while in the company's possession and care. It is appropriate for the Sessions Court to uphold the doctrine of separate corporate responsibility here as the

Sessions Court is dealing with the liability of the company *per se* for losses. The nature of liability for fraud in the present case is wildly different from the case in the Sessions Court. The present case deals with the liability of a director who has conducted the company's business knowingly with the intent to defraud the company's creditors. There is a vast difference between liability for losses, and liability for fraud. Thus, the dismissal of the Sessions Court case against the defendant has no bearing at all to the present case.

[38] Therefore, this court finds that the defendant has indeed conducted the company's business with the intent to defraud the creditor-plaintiffs and by the operation of s. 304(1) of the Act the defendant should be attached with the company's liabilities under the judgment of the Sessions Court to pay the creditor-plaintiffs their judgment sums and costs respectively.

Court's Directions

[39] In light of all of the above findings, it is this court's decision that the plaintiffs have clearly and successfully proven their case on the balance of probabilities.

[40] This court hereby dismisses all of the defendant's defence.

[41] This court declares that the defendant has conducted the business of the company with the intent to defraud the plaintiffs, its creditors, or for a fraudulent purpose.

[42] This court further declares that the defendant, having full knowledge of the fraudulent conduct, shall be attached with the company's liability to pay the plaintiffs their respective judgment sums and costs.

[43] This court further orders that the defendant to be personally liable to pay P1 the sum of RM32,476 with interest at 8% per annum from 4 May 2011 till full realisation.

[44] This court also orders that the defendant to be personally liable to pay P2 RM105,686.34 with interest at 8% per annum from 4 May 2011 till full realisation.

[45] This court further orders that the defendant to be personally liable to pay costs to the plaintiffs as per the judgment of the Sessions Court to the amount of RM8,815.

On The Issue Of Costs

[46] This court also hereby orders the defendant to pay the plaintiffs a sum of RM10,000 for each plaintiff.